Mohd Zaiham bin Mislan v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–134 OF 2008(C)
AUGUSTINE PAUL, ZULKEFLI AND MOHD GHAZALI FCJJ
19 OCTOBER 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether accused had knowledge necessary to establish possession — Whether trial judge erred in admitting cautioned statement — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)

Evidence — Inference — Conduct of appellant — Whether appellant failed to explain his conduct — Whether inference could be drawn from conduct that appellant had knowledge necessary to establish possession — Evidence Act 1950 ss 8 & 9

Evidence — Statement — Cautioned statement — Admissibility of — Whether reading caution to appellant amounted to administering caution — Whether there is requirement to explain caution to accused person — Whether cautioned statement inadmissible if it contained previous drug dealing of appellant — Failure to challenge testimony of recording officer — Whether failure amounted to acceptance of witness's testimony

On 22 April 1999, police officers on patrol duty saw a car overtaking them at a double line area along the road in breach of the Highway Rules. They gave chase and caught up with the driver of the car who was identified as the appellant. In the course of the examination of the appellant and the car he was driving the police officers detected the aroma of cannabis from the car and also found the appellant to be worried and anxious. The officers then directed the appellant to open the boot of the car and found the spare tyre of the car missing from its compartment. In the spare tyre compartment they found slabs wrapped in plastic, which were later confirmed by the chemist to be 45,565g of cannabis. The appellant was charged with the offence of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the trial the prosecution adduced evidence that the appellant had hired the car in Johor Bahru and had left the spare tyre he had removed from that car in the house of the friend who had stood as guarantor for the hired car. After a trial within a trial the appellant's cautioned statement, which was found to

be free of any threat or inducement, was admitted in evidence. The High Court judge found based on the direct evidence that the appellant had intentionally transported and concealed the cannabis in the hired car and that the defence case was unbelievable and had not raised a reasonable doubt. The appellant was therefore convicted on the charge and sentenced to death. On appeal the Court of Appeal affirmed the decision of the High Court. The Court of Appeal found that the appellant's behaviour in arranging for the transport, readying space in the boot of the car and his anxious behaviour when detained all pointed to the fact that the appellant had custody or control not only of the car but also knowledge of the cannabis in the car. This was the appellant's appeal against that decision. The appellant's only ground of appeal in this appeal was that the trial judge had erred in admitting the appellant's cautioned statement. The appellant submitted that the cautioned statement was inadmissible for two reasons; firstly because the caution was merely read and not administered to him in that it was not explained together with its consequences; and secondly because it contained very prejudicial evidence of a previous drug dealing of the appellant which was evidence of bad character and which could have prejudiced the trial judge in arriving at his decision to convict the appellant. As such the appellant contended that the cautioned statement should be ruled inadmissible and that the conviction based on that cautioned statement could not stand.

Held, dismissing the appellant's appeal:

(1) There is no statutory requirement under the law, be it the Criminal Procedure Code or the Act that the caution administered by the recording officer to the accused person must be explained. The only requirement for the statement to be admissible is that it must be voluntarily given and to arrive at that finding the trial judge must assess all the facts and circumstances that surround the giving of that statement. In the present case the appellant and the recording officer were both Malays and the factor of language in administering the caution and the recording of the statement in the Malay language was a non-issue. Further, when the recording officer had testified that he had explained the caution to the appellant he was never challenged at any stage of the trial. It is an accepted principle of law that failure by the accused to cross-examine the prosecution witness on a crucial part of the case will amount to an acceptance of the witness's testimony (see paras 17–21).

(2) The extra piece of information provided by the appellant as to his previous drug dealing merely showed that the appellant was very co-operative and that the statement given was voluntary. There was nothing to show that the trial judge had been influenced or had been

clouded in arriving at his conclusion by this evidence. The prosecution in the present case had established beyond reasonable doubt that the cautioned statement was voluntarily given and thus it was admissible in evidence (see para 23).

(3) In any case, as the Court of Appeal had rightly stated, even if the cautioned statement in the instant case was ruled inadmissible, the other available evidence was more than sufficient to sustain the appellant's conviction on trafficking. The only conclusion that could be drawn from the evidence adduced was that the appellant was in absolute control of the car and master of everything in it (see paras 24 & 26).

(4) The trial judge had properly directed himself on the law in arriving at his finding because there was a connection between the appellant's conduct and his knowledge in relation to the cannabis found in the car. The appellant's conduct of pleading with the officers on patrol duty not to take action against him and his conduct of being uneasy when asked to open the boot of his car were relevant and admissible under s 8 of the Evidence Act ('the EA'). There was also a connection between his act of pleading to the police officers, the smell of ganja and the subsequent finding of the cannabis in the boot of the car. The appellant was therefore required to explain his conduct under s 9 of the EA but he failed to do so. As such the inference to be drawn from this evidence was that the appellant had knowledge or mens rea possession of the drugs independent of the statutory presumption under s 37(d) of the Act (see para 28).

[Bahasa Malaysia summary

Pada 22 April 1999, pegawai-pegawai polis yang sedang bertugas melihat kereta memotong mereka di kawasan bergarisan kembar sepanjang jalan yang telah melanggar Peraturan-Peraturan Lebuh Raya. Mereka telah mengejar dan menahan pemandu yang dikenali sebagai perayu. Semasa pemeriksaan dijalankan ke atas perayu dan kereta yang dipandunya pegawai-pegawai polis telah mengesan bau kanabis dalam kereta dan juga mendapati perayu dalam keadaan bimbang dan cemas. Pegawai-pegawai kemudian telah mengarahkan perayu untuk membuka but kereta dan mendapati tayar ganti kereta tidak ada dalam kompartmennya. Dalam kompartmen tayar ganti itu dijumpai kepingan tebal yang dibungkus dalam plastik, yang kemudiannya disahkan oleh ahli kimia sebagai kanabis seberat 45,565g. Perayu telah dituduh atas kesalahan mengedar di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Semasa perbicaraan pihak pendakwaan telah mengemukakan keterangan bahawa perayu telah menyewa kereta itu di Johor Bahru dan meninggalkan tayar ganti yang dialihkannya daripada kereta ke

dalam rumah rakan yang menjadi penjamin kereta yang disewa itu. Selepas perbicaraan dalam perbicaraan kenyataan beramaran perayu, yang didapati bebas daripada apa-apa ugutan atau pendorong, telah diterima sebagai keterangan. Hakim Mahkamah Tinggi mendapati berdasarkan keterangan langsung bahawa perayu telah dengan sengaja membawa dan menyembunyikan kanabis itu dalam kereta sewa dan bahawa kes pembelaan tidak boleh dipercayai dan tidak menimbulkan keraguan munasabah. Perayu dengan itu telah disabitkan atas pertuduhan dan dihukum mati. Semasa rayuan Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Mahkamah Rayuan mendapati bahawa kelakuan perayu yang menguruskan pengangkutan, memberi ruang dalam but kereta dan kelakuan cemasnya semasa ditahan kesemuanya menunjukkan kepada fakta bahawa perayu mempunyai jagaan atau kawalan bukan sahaja ke atas kereta itu tetapi juga mempunyai pengetahuan tentang kanabis dalam kereta itu. Ini adalah rayuan perayu terhadap keputusan tersebut. Satu-satunya alasan perayu dalam rayuan ini adalah bahawa hakim perbicaraan telah terkhilaf kerana telah menerima kenyataan beramaran perayu. Perayu menghujahkan bahawa kenyataan beramaran tidak boleh diterima kerana dua sebab; pertama kerana amaran hanya dibaca tetapi tidak diberikan kepadanya, iaitu amaran tersebut tidak dijelaskan bersama dengan akibatnya; dan kedua oleh kerana ia mengandungi keterangan yang amat prejudis berhubung urusan dadah perayu sebelumnya yang merupakan keterangan kelakuan buruk dan akan memprejudiskan hakim perbicaraan dalam membuat keputusan mensabitkan perayu. Oleh itu perayu menegaskan bahawa kenyataan beramaran tersebut patut diputuskan sebagai tidak boleh diterima dan bahawa sabitan yang berdasarkan kenyataan beramaran itu tidak boleh dikekalkan.

Diputuskan, menolak rayuan perayu:

(1) Tiada keperluan statutori di bawah undang-undang, dalam Kanun Prosedur Jenayah atau Akta tersebut bahawa amaran yang diberikan oleh pegawai pencatat kepada tertuduh hendaklah dijelaskan. Satu-satunya keperluan agar kenyataan itu diterima adalah ia perlu diberi secara sukarela dan untuk memutuskan ianya diberi secara sukarela, hakim perbicaraan perlu menilai kesemua fakta dan keadaan yang meliputi pemberian kenyataan tersebut. Dalam kes ini perayu dan pegawai pencatat berbangsa Melayu dan faktor bahasa dalam memberikan amaran dan merekodkan kenyataan dalam bahasa Melayu bukan menjadi isu. Bahkan, apabila pegawai pencatat memberi keterangan bahawa dia telah menjelaskan amaran kepada perayu dia tidak dicabar pada mana-mana peringkat perbicaraan. Ianya merupakan prinsip undang-undang yang diterima bahawa kegagalan tertuduh

untuk memeriksa balas saksi pendakwaan berhubung bahagian penting kes bermaksud penerimaan keterangan saksi tersebut (lihat perenggan 17–21).

(2) Maklumat tambahan yang dikemukakan oleh perayu berhubung urusan dadahnya sebelum ini hanya menunjukkan bahawa perayu memberi kerjasama dan kenyataan itu telah diberikan secara sukarela. Tiada apa-apa yang menunjukkan bahawa hakim perbicaraan telah dipengaruhi atau dikaburi apabila membuat kesimpulannya berdasarkan keterangan ini. Pendakwaan dalam kes ini telah membuktikan melampaui keraguan munasabah bahawa kenyataan beramaran itu diberikan secara sukarela dan oleh itu diterima sebagai keterangan (lihat perenggan 23).

(3) Dalam apa jua keadaan, seperti yang dinyatakan sewajarnya oleh Mahkamah Rayuan, jikapun kenyataan beramaran dalam kes ini diputuskan tidak diterima, keterangan sedia ada yang lain lebih daripada memadai untuk mengekalkan sabitan pengedaran perayu. Satu-satunya kesimpulan yang boleh dibuat berdasarkan keterangan yang telah dikemukakan adalah perayu mempunyai kawalan penuh ke atas kereta itu dan dialah yang menguasai segala di dalamnya (lihat perenggan 24 & 26).

(4) Hakim perbicaraan dengan sewajarnya telah mengarahkan dirinya dari segi undang-undang semasa membuat penemuan beliau kerana terdapat kaitan antara perlakuan perayu dan pengetahuannya berhubung kanabis yang dijumpai dalam kereta tersebut. Perlakuan perayu yang merayu kepada pegawai-pegawai yang bertugas agar tidak mengambil tindakan terhadapnya dan perlakuannya yang berasa tidak selesa apabila diminta membuka but keretanya adalah relevan dan diterima di bawah s 8 Akta Keterangan 1950 ('AK'). Terdapat juga kaitan antara tindakannya merayu kepada pegawai-pegawai polis, bau ganja dan kemudiannya penemuan kanabis dalam but kereta itu. Perayu dengan itu dikehendaki menjelaskan perlakuannya di bawah s 9 AK tetapi dia telah gagal untuk berbuat demikian. Oleh itu inferens yang boleh dibuat berdasarkan keterangannya adalah bahawa perayu mempunyai pengetahuan atau mens rea milikan dadah berasingan dengan andaian statutori di bawah s 37(d) Akta tersebut (lihat perenggan 28).]

Notes

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2385–2402.

For cases on inference generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1791–1793.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Boudreau v The King (1949) 94 CCC 1, SC (refd)
Mohamed Mokhtar v PP [1972] 1 MLJ 122, HC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Aidil Ma'rof [1992] 3 CLJ 317 (Rep), HC (refd)
PP v Kalaiselvan [2001] 2 MLJ 157, HC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (folld)
Tan Too Kia v PP [1980] 2 MLJ 187, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code
Dangerous Drugs Act 1952 ss 37(d), 37A(1)
Evidence Act 1950 ss 8, 9, 54(1), 167

Appeal from: Criminal Appeal No C-05–41 of 2000 (Court of Appeal, Putrajaya)

Gurbachan Singh (Bachan & Kartar) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli FCJ:

INTRODUCTION

[1] The appellant was charged in the High Court at Kuantan on the following charge:

> Bahawa kamu pada 22hb April, 1999 jam lebih kurang pukul 8.10 malam di dalam sebuah kenderaan No. JCY 3936 bertempat di Kilometer 14, Jalan Pekan/Nenasi, Pekan, di dalam Daerah Pekan, dalam Negeri Pahang Darul Makmur telah didapati mengedar dadah berbahaya iaitu cannabis (ganja) seberat 45,565 gram, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234), dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The learned judge of the High Court found the appellant guilty, convicted him on the charge and sentenced him to death. He appealed to the Court of Appeal against the decision of the High Court. The learned judges of the Court of Appeal dismissed the appeal and affirmed the conviction and sentence in respect of the charge. Being dissatisfied with the decision, the appellant now appeals to this court against the whole decision of the Court of Appeal.

THE CASE FOR THE PROSECUTION

[3] The evidence adduced by the prosecution from the relevant prosecution witnesses may be summarised as follows:

[4] On 22 April 1999 at about 8pm, L/Kpl Abdul Rahim ('SP8') and L/Kpl Zainuddin ('SP10') while on patrol duty in a patrol car saw a Proton Wira car bearing registration No JCY 3936 overtaking them at a double line area along the road at 14th kilometer Jalan Pekan/Nenasi, Pekan. Observing that there has been a breach of the highway rules by the driver of the car, they gave chase to the said car which was eventually overtaken. It then came to a stop. SP8 then directed the driver to come out of the car and asked him to produce his driving licence. At the same time SP8 informed him of the traffic offence he had just committed. The driver was identified as the appellant.

[5] In the course of the examination of the appellant and the car he was driving SP8 detected the aroma of cannabis from the car. SP8 then asked the appellant whether he had cannabis with him. The appellant pleaded with SP8 not to take any action against him before handing over his driving license. SP8 testified that the appellant looked anxious and worried. SP8 then directed him to open his car boot and the compartment of the spare tyre. Upon opening the boot, SP8 saw slabs wrapped in plastic inside the spare tyre compartment which he suspected to be cannabis. SP8 found the spare tyre of the car in the boot missing. In the boot were also found the Johor edition of the *Harian Metro* newspaper dated 20 April 1999 and the *Utusan Malaysia* newspaper dated 21 April 1999. The appellant was arrested and brought to the police station.

[6] ASP Abdul Razak ('SP16') in the course of his investigation discovered that the appellant was in Johor Bahru on 20 April 1999 and had hired the car there. The missing spare tyre of the car was found to have been left at the house of one Mohamad Rashid ('SP5'), a friend of the appellant and the person who had stood as the guarantor for the car hired by the appellant. The appellant had informed SP5 that he had hired the car as he intended to drive up north. SP5 in his evidence stated that he only realised the existence of the spare tyre at his house after returning from work.

[7] Mohd Shariff ('SP1'), the chemist conducted four tests for the drugs in this case, namely the physical, microscopic, the dequinine levine test ('DLT') and the TLC on the offending slabs and confirmed that they were cannabis weighing 45,565g.

[8] The cautioned statement ('exh P27') of the appellant recorded by ASP Mohd Sakri ('SP9') was admitted as evidence after a trial-within-a trial

conducted by the learned trial judge.

FINDINGS OF THE HIGH COURT

[9] The learned judge of the High Court in finding the appellant guilty of the charge had, inter alia, made the following findings:

(a) The cautioned statement P27 was free of any threat, promise or inducement and was admissible. The cautioned statement was given voluntarily.

(b) The chemist's evidence which had concluded that the plant material were in fact cannabis was credible.

(c) The appellant had custody, control and possession of the cannabis.

(d) The appellant was trafficking in the drugs, ie by direct evidence, as he had intentionally transported and concealed the cannabis in the Proton Wira car bearing registration No JCY 3936.

(e) The defence case was unreasonable, unbelievable and had not raised a reasonable doubt in the case for the prosecution.

FINDINGS OF THE COURT OF APPEAL

[10] The Court of Appeal in affirming the decision of the High Court had, inter alia, made the following pertinent findings against the appellant:

> In fact, from the chain of abundant evidence adduced by the prosecution (even without the assistance of the cautioned statement), in particular the preparation prior to the buying of the drugs in the like of having a mode of a transport, readying space for the offending drugs, his anxious behavior when detained, the strong aroma that permeated the air and promptly detected by SP8 and the other police personnel, all pointed to this ingredient having sufficiently proved. With the appellant positively having custody or control not only of the vehicle, but also knowledge of the drugs in the car, the learned judge was perfectly right in finding the prosecution having proved the ingredient of possession independently of s 37(a) of the Act (see p 22 of the appeal record Vol 1).

THE APPEAL

[11] Before this court learned counsel for the appellant submitted that the only ground the appellant wishes to argue is that the learned trial judge erred in admitting the cautioned statement (P27) of the appellant. It is the contention of the appellant that there are two major defects in the recording of P27 which are as follows:

[12] Firstly, it was contended that the caution was merely read and not administered in the sense that it was not explained together with its consequences. In support of his contention learned counsel cited the case of *Public Prosecutor v Kalaiselvan* [2001] 2 MLJ 157 wherein Augustine Paul J (as he then was) in his judgment, inter alia, had this to say:

> The explanation of the caution by PW6 deviates from the requirement of the statutory caution in two respects. Firstly, the explanation conveyed to the accused means that if he chose not to make a statement to PW6 then he must make one in court. This makes it obligatory to make a statement and thus dilutes the right of the accused to remain silent which was subsequently communicated to him. Secondly, the explanation of the caution by PW6 to the accused did not refer to the part of the caution which states that there is no obligation to answer any question. The omission of the right of a person not to answer any questions in the administration of a caution will render the statement made inadmissible.

[13] Learned counsel for the appellant submitted that merely reading the caution to a person is a mechanical exercise and does not amount to administering the caution. It was further submitted that although SP9 said in his evidence that he had explained the caution to the appellant, not a word was mentioned in P27 itself about this. It is the contention of learned counsel that the oral evidence of SP9 should not have been admitted. It is a clear afterthought and is very doubtful as to whether SP9 had in fact explained the caution. In any event learned counsel for the appellant submitted that there was no evidence as to what was the nature of the explanation given by SP9.

[14] Secondly, learned counsel for the appellant contended that the cautioned statement P27 contained very prejudicial evidence of a previous drug dealing of the appellant which is evidence of bad character and reference was made to s 54(1) of the Evidence Act 1950 which reads as follows:

> (1) In criminal proceedings the fact that the accused person has a bad character is irrelevant; unless evidence has been given that he has a good character, in which case it becomes relevant.

[15] In relation to this evidence of bad character of the appellant, it was submitted that the learned trial judge could have been prejudiced in arriving at his decision in convicting the appellant as he had mentioned in his judgment about the previous drug dealing of the appellant as follows:

> Tertuduh juga mengakui pergi ke Tak Bai kali pertama bersama Sam dan diperkenalkan dengan Maggie dan kali keduanya dia pergi sendiri dan membawa balik 45kg ganja. Tertuduh tahu keluasan ruang yang diperlukan dalam boot JCY 3936 untuk menyimpan 48kg ganja yang akan dibelinya dan dibawa pulang dan

atas dasar itulah dalam P27 dia mengaku dia buka tayar simpanan untuk simpanan ganja didalamnya (see p 14 of the judgment).

[16] Based on the above mentioned defects in the cautioned statement, learned counsel for the appellant contended that the cautioned statement should be ruled inadmissible. As the conviction of the appellant was based on the cautioned statement it should therefore follow that the appeal be allowed and the appellant acquitted and discharged. With respect I am of the view that such a contention by the appellant is untenable in the circumstances of the case for the following reasons:

[17] It is my considered view there is no statutory requirement under the law, be it under the Criminal Procedure Code or the Dangerous Drugs Act 1952 ('the Act') that the caution administered by the recording officer to the accused person must be explained. The caution as found in s 37A(1) of the Act states as follows:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

[18] It is clear that the above provision is silent as to whether the caution must be explained to ensure comprehension of it. The only essential requirement for the statement to be made admissible is that it must be voluntarily given and to arrive at that finding the trial judge must assess all the facts and circumstances that surround the giving of the statement (see the case of *Boudreau v The King* (1949) 94 CCC 1 (SCC)). On the issue of whether there is a requirement to explain the caution to the accused person, I am of the view it would very much depend on the facts and circumstances of each case (see the case of *Public Prosecutor v Aidil Ma'rof* [1992] 3 CLJ 317 (Rep)). It would be most appropriate for example when an accused person has a poor command of the language adverted to under the caution administered that an explanation must be provided for to ensure adequacy of protection for him.

[19] On the facts of this case I do not think SP9 is required to explain the caution to the appellant after it was administered. The caution was administered in the Malay language as the appellant is a Malay person. There was no necessity to provide an interpreter. In the case of *Tan Too Kia v Public Prosecutor* [1980] 2 MLJ 187 the Federal Court had occasion to remark, inter alia, as follows:

> … we would observe that generally speaking it is desirable that a suspect be interrogated in a language in which he is at home …

[20] In the present case since the appellant is a Malay and the recording officer SP9 is also a Malay, it is my view that the factor of language in administering the caution and the recording of the statement in the Malay language is a non-issue. It is to be noted that in P27 it is recorded that the appellant had answered in the affirmative when asked whether he understood the caution. He was also asked whether he still wanted to make a statement pertaining to the arrest since he understood the caution. His answer remained in the affirmative. He also reaffirmed that the statement he was supplying was not given under threat, promise or inducement.

[21] SP9 had testified that he had explained the caution to the appellant although he had not recorded the explanation factor in the impugned statement. This part of the evidence of SP9 about him explaining the caution to the appellant was never challenged at any stage of the trial. This issue was only taken up by learned counsel for the appellant at the appellate stage. It is my view that as SP9 had stated in evidence that he had explained the caution to the appellant the burden is on the appellant to cross-examine SP9 as to the form and manner of explanation given by him. On this point I would like to state here that it is an accepted principle of law that failure by the accused to cross-examine the prosecution witness on a crucial part of the case will amount to an acceptance of the witness's testimony (see the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). Of course the position will be different if there is a legal duty to explain the caution.

[22] As regards the case of *Public Prosecutor v Kalaiselvan* cited by learned counsel for the appellant to support his contention of the need for the caution to be explained together with its consequences, I find nowhere in the judgment of the learned judge that he had stated there is such a requirement to be complied with. In the said case there was in fact an explanation of the caution made by the recording officer to the accused person. The learned judge in his judgment was merely addressing himself on the form and manner in which the explanation of the caution was made to the accused person. He then came to a conclusion that as the caution was not properly and adequately explained the statement made was inadmissible. The learned judge had rightly stated in his judgment on this issue of whether there is a need to explain the caution or not at p 169 as follows:

> A determination of this issue will, of course, depend on the circumstances of each case … Where, however, the caution has been explained, it is my view that the explanation offered must not deviate from the language and spirit of the caution as prescribed by law. It follows that a caution read out in its regular form but subsequently explained in an irregular manner will lose its value as a properly administered caution.

[23] I shall now deal with the second argument raised by the appellant regarding the cautioned statement to the effect that it had included a previous drug transaction of the appellant and had hence affected its admissibility. On this issue I am in agreement with the finding of the Court of Appeal that this extra piece of information supplied by the appellant to the recording officer could not have been conjured by him as he was not an interested person. It was an information which was voluntarily supplied by the appellant when the need did not arise. This merely goes to show that the appellant was very cooperative and the statement given in the course of the recording session was voluntary. On this impugned statement it is noted that it was made in the context of the space required in the car to hide the 45kg of cannabis which entailed the taking out of the spare tyre so as to provide a space for the drugs. I do not find that the learned trial judge had been influenced or had been clouded in arriving at his conclusion by this evidence. It is my considered view that even if the impugned statement was an improper admission of evidence, nevertheless there was ample evidence to justify the conviction (see s 167 of the Evidence Act 1950). It is my judgment that the prosecution has established beyond reasonable doubt that the cautioned statement (P27) was voluntarily given, and thus admissible in evidence.

[24] Even assuming that the cautioned statement (P27) is ruled inadmissible, I am of the view that the other available evidence is more than sufficient to sustain the conviction of the appellant on the charge framed. On this point, the Court of Appeal had rightly stated in its judgment that even without the cautioned statement it was safe to commit the appellant based on the other evidence. It must be noted that in a case involving purely a question of fact the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see the case of *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). The Court of Appeal had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and that it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal record. I am therefore of the view that the Court of Appeal did not err on this issue.

[25] I would hasten to state here that on the evidence of custody, control, knowledge and possession of the drugs by the appellant, the prosecution has succeeded in proving these essential ingredients by the following evidence:

(a) he was the driver of the car and alone at the time of the arrest;

(b) the car was with him two days prior to his arrest;

(c) the drugs were recovered from the compartment of the spare tyre inside the boot of the car and the spare tyre was found missing;

(d) he felt uneasy, scared and nervous when SP8 asked him to open his car boot;

(e) the strong aroma that permeated the air coming from the appellant's car promptly detected by SP8 and the other police personnel;

(f) he pleaded twice to SP8 not to take action against him when asked whether he had ganja in his car; and

(g) his conduct in trying to escape and struggle before he was apprehended by SP10.

[26] The only conclusion that can be made on the evidence adduced is that the appellant was in absolute control of the car and master of everything in it. On this point in the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 the Federal Court, inter alia, held that:

> The incontrovertible facts as found by the trial judge was that the three packages were found in the car driven by the respondent, that the respondent was the only person in the car at the material time, that one package was found under the driver's seat and two packages under the passenger's seat and that the car was in the possession of the respondent for more than seven months prior to his arrest. Under the circumstances, the trial judge was right in holding that at the material time the packages were in the custody and control of the respondent. The irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s 37(d) of the Act.

[27] In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 the Federal Court explained the connection between the conduct and knowledge of an accused person in relation to the offending exhibits found in his possession and the need for him to offer an explanation as follows:

> The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s 8 of the Evidence Act 1950 ('the Act') since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by s 9 of the Act. However, as the appellant did not offer any explanation for his reaction upon being

approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that he knew what he was carrying.

[28] Likewise, in the present case I am of the view that the appeal made by the appellant to SP8 not to take action against him after he was asked whether he had ganja in his car and his conduct of being uneasy, scared and nervous when SP8 asked him to open his car boot are relevant and admissible under s 8 of the Evidence Act. There is also a connection between the act of pleading to SP8 by the appellant and the smell of ganja and subsequently the finding of the ganja in the appellant's car. The appellant must therefore explain his conduct as required by the provision of s 9 of the Evidence Act. The appellant has failed to do so in this case. Therefore the inference to be drawn from the evidence was that the appellant knew what he was carrying. Based on the evidence adduced by the prosecution it can safely be concluded that the appellant had mens rea possession of the drugs in the car independent of the statutory presumption under s 37(d) of the Act.

CONCLUSION

[29] For the reasons above stated I would dismiss the appellant's appeal. The conviction recorded and the sentence passed by the High Court and affirmed by the Court of Appeal are hereby affirmed.

[30] My learned brothers Augustine Paul FCJ and Mohd Ghazali bin Mohd Yusoff FCJ have seen this judgment in draft and have expressed their concurrence.

Appellant's appeal dismissed.

Reported by Kohila Nesan